# FIRST AMENDMENT

**Heffernan v. City of Paterson, New Jersey, --- U.S. --- (2016)**
**Decided April 26, 2016**

**FACTS:** In 2005, Heffernan was a Paterson, NJ, police officer. He worked in Chief Wittig's office. At that time, the incumbent mayor, Torres, was running against Spagnola. Torres had appointed both Wittig and Heffernan's immediate supervisor. Heffernan was a close friend of Spagnola.

During the campaign, Heffernan picked up a large Spagnola sign, on behalf of his mother. While at the distribution site, he spoke to campaign staff, and was seen there by police officers. "Word quickly spread throughout the force." The next day, Heffernan was demoted from detective to a patrol walking beat, as punishment for his "overt involvement." In fact, he had no involvement with the campaign at all.

Heffernan filed suit in federal court, arguing that he had been demoted "because he had engaged in conduct that (on their mistaken view of the facts) constituted protected speech." The District Court found that he was not engaged in First Amendment speech and thus, he had not been deprived of any constitutionally protected right. The Third Circuit Court of Appeals affirmed that, finding that ""a free-speech retaliation claim is actionable under §1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights."

Heffernan requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Does the First Amendment bar the government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate.

**HOLDING:** Yes

**DISCUSSION:** The Court began, noting that "with a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate."[1] While the "basic constitutional requirement reflects the First Amendment's hostility to government action that "prescribe[s] what shall be orthodox in politics,"[2] the "exceptions take account of 'practical realities' such as the need for 'efficiency' and 'effective[ness]' in government service."[3]

For purposes of the case, the Court assumed that the exceptions did not apply and that the "activities that Heffernan's supervisors thought he had engaged in are of a kind that

[1] Elrod v. Burns, 427 U. S. 347 (1976); Branti v. Finkel, 445 U. S. 507 (1980).
[2] West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624 (1943)
[3] Waters v. Churchill, 511 U. S. 661, 672 (1994); Civil Service Comm'n v. Letter Carriers, 413 U. S. 548 (1973)

they cannot constitutionally prohibit or punish.[4] As such, the supervisors were mistaken about the facts, but were motivated to take the action by their mistaken beliefs.

The Court agreed that the statute does not resolve whether the right is focused on the actual activity, or on the employer motive. In most of the prior case law, there was, in fact, no mistake, the subject was engaging in protected activity. The Court then looked to Waters v. Churchill, which is more to the point. In that case the Court did consider the consequences of an employer mistake. The employer wrongly, though reasonably, believed that the employee had spoken only on personal matters not of public concern, and the employer dismissed the employee for having engaged in that unprotected speech. The employee, however, had in fact used words that did not amount to personal "gossip" (as the employer believed) but which did, in fact, focus on matters of public concern. The Court asked whether, and how, the employer's factual mistake mattered. The Court held that, as long as the employer (1) had reasonably believed that the employee's conversation had involved personal matters, not matters of public concern, and (2) had dismissed the employee because of that mistaken belief, the dismissal did not violate the First Amendment. In a word, it was the employer's motive, and in particular the facts as the employer reasonably understood them, that mattered.

The Court agreed that "after all, in the law, what is sauce for the goose is normally sauce for the gander." The Court agreed that:

> … as in Waters, the government's reason for demoting Heffernan is what counts here. When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U. S. C. §1983—even if, as here, the employer makes a factual mistake about the employee's behavior.

The Court continued:

> The constitutional harm at issue in the ordinary case consists in large part of discouraging employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities. The discharge of one tells the others that they engage in protected activity at their peril. Hence, we do not require plaintiffs in political affiliation cases to "prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance."[5] The employer's factual mistake does not diminish the risk of causing precisely that same harm. Neither, for that matter, is that harm diminished where an employer announces a policy of demoting those who, say, help a particular candidate in the mayoral race, and all employees (including

[4] Rutan v. Republican Party of Ill., 497 U. S. 62 (1990) ("joining, working for or contributing to the political party and candidates of their own choice"),
[5] Branti, supra.

> Heffernan), fearful of demotion, refrain from providing any such help.[6] The upshot is that a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake.

The Court agreed that to win, an "employee must prove an improper employer motive." In this situation, there is at least some evidence that Heffernan's dismissal may have occurred "pursuant to a different and neutral policy prohibiting police officers from overt involvement in any political campaign. " For that reason, the Court reversed the lower courts and remanded the case for further proceedings.

**FULL TEXT OF OPINION:** **http://www.supremecourt.gov/opinions/15pdf/14-1280_k5fl.pdf**

*Of special note to Kentucky officers: KRS 95.017, KRS 95.470 and 95.762.*

[6] Cf. Gooding v. Wilson, 405 U. S. 518 (1972) (explaining that overbreadth doctrine is necessary "because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions").